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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of 47 C.F.R. §1.1200)
et seq. Concerning Ex Parte)
Presentations in Commission Proceedings)

GC Docket No. 95-21

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To: The Commission

INITIAL COMMENTS

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Its President and Attorney

April 13, 1995

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INITIAL COMMENTS

Consultants, Inc. (hereinafter referred to as "Consultants"), by its President and Attorney, offers the following initial comments to the Commission in response to its Notice of Proposed Rulemaking in the above-captioned proceeding. This document appeared in the Federal Register on February 16, 1995.¹

Consultants² applauds the Commission's efforts to simplify and streamline its ex parte rules. The ex parte procedures are essential to the maintenance of a fair and open decision-making process. Consultants believes that the current ex parte rules do not adequately protect the integrity of the decision-making process for the vast majority of decisions made by the full Commission. Consultants respectfully offers the following comments that it believes will improve upon the Commission's initial ideas for modifying its current ex parte process.

¹ 60 F.R. 8995 (Thursday, February 16, 1995).

² Consultants, Inc. provides legal and consulting services to companies before the FCC and the federal courts. Its principal, Brent Weingardt, formerly served as Legal Advisor to the FCC Managing Director and participated in previous revisions to the ex parte rules.

I. The Commission Should Adopt a Version of the Sunshine Agenda Prohibition Period For its Circulation Item Decision-Making

Under the current ex parte rules, the Commission imposes a complete prohibition on presentations concerning a particular matter upon the release of Public Notice announcing that the matter is scheduled for consideration at an open Commission meeting (This Public Notice is referred to as the "Sunshine Notice.") The Sunshine Notice is released at least one week prior to the open meeting as required by law.³ The prohibition on all presentations continues until the decision is released to the public, deleted from the Sunshine Agenda or returned to the staff for further consideration.

As the Commission has repeatedly explained, this Sunshine period prohibition on all presentations in the days leading up to a decision provides the Commissioners with a vitally important "period of repose."

The [Sunshine prohibition] rule does serve one vitally important purpose, however; it provides decision-makers with a "period of repose" during which they can be assured that they will be free from last minute interruptions and other external pressures, thereby promoting an atmosphere of calm deliberation. As noted in the 1980 Report and Order (citation omitted), the period of repose provided under the rule adds further assurance that the Commission decisions are made free from "any hint of external pressure" and are "as objective and well reasoned as possible." This, in turn, leads to increased "confidence of the public and the courts" in the agency's work.

Report and Order in General Docket 86-225, 2 FCC Rcd 3011, 3020 (1987). ⁴

³ 5 U.S.C. §552b(e)(1); 47 C.F.R. §0.605.

⁴ "In any case it (a short cutoff of all presentations in non-restricted proceedings) is a necessary price if the Commission is to enjoy the confidence of the public and the courts." Report and Order in General Docket 78-167, 78 FCC 2d 1384, 1403 (1980).

Today, this "vitally important" period of repose applies only to a very small number of full Commission decisions. The overwhelming majority of actions taken by the full Commission are done on circulation⁵ -- not in public agenda meetings -- where a prohibition on last minute presentations does not apply. In calendar year 1994, the full Commission issued 358 decisions. The Commission decided 66 items (18 percent) in open meetings and 292 items (82 percent) via circulation.⁶

The Commission's proposal for adopting a "limited" sunshine period for its circulation items provides none of the protections nor meets the policy goals that the Commission itself has determined are vital to objective decision-making. Instead, the Commission's proposal establishes a prohibition on presentations only after the Commission has decided a matter on circulation. Under the Commission's proposal, members of the public could continue to provide ex parte presentations up to a minute before a Commissioner enters his or her vote on circulation. Only after the public learns that a decision has been made would the Commission prohibit lobbying on the issue.

Consultants respectfully submits that there is no rational basis for such a rule -- other than limiting the public from assisting in the staff's editing process of already-voted items. The Commission's limited proposal merely adopts a lobbying prohibition after the last minute lobbying has been completed.

⁵ "Circulation" involves the submission of a document to each of the Commissioners for his or her approval. Votes are registered by computers in each Commissioner's office. See 47 C.F.R. §0.10(d).

⁶ These are actions that receive "FCC Numbers," indicating that the action was taken by vote of the Commissioners rather than by the staff on delegated authority. Data from Office of the Secretary, Agenda Branch.

When the Commission first adopted a cutoff on ex parte presentations in informal rule makings in 1978, it did not intend to make a distinction between items decided on an open agenda and those decided by circulation. "We propose to designate some specific point in each rulemaking after which all ex parte contact would be prohibited." (emphasis added).⁷ The Commission carried forward this "generic" cut-off of ex parte presentations in its adoption of permanent rules in 1980. " We will continue to cut off all ex parte presentations in non-restricted proceedings at the time when the Commission begins its final deliberations."⁸

It is quite likely that at the time the Commission first created the period of repose most, if not all, non-restricted rulemaking proceedings were decided at open meetings. Nowhere does the record indicate that the Commission thought that only certain of its decision processes required a period of repose or that it meant to exclude circulation items. This Commission should recognize that the growth of the circulation process -- and its dominance today as the preferred method of decision-making -- leaves the very same type of decisions formerly decided in open meetings subject to the unseemly last-minute lobbying that prior Commissions sought to eliminate.

⁷ Order, Notice of Inquiry and Interim Policy Statement in General Docket 78-167, 68 FCC 2d 804, 810 (1978).

⁸ Report and Order, 78 FCC 2d 1384, 1402 (1980); See also, Report and Order in General Docket 86-225, 2 FCC Rcd 3011, 3021 (1987): "...[W]e believe that the period of repose should apply to all proceedings that fall in the non-restricted category."

II. The Commission's Proposal to Allow "Permit-but-Disclose" Presentations for Adjudicatory-type Proceedings Increases the Need for a Period of Repose for Circulation Items

The Commission's failure to insulate its circulation actions from last-minute ex parte lobbying is particularly troubling when viewed in conjunction with its proposal to allow "permit-but-disclose" ex parte presentations in adjudicatory-type proceedings. Currently, most of these proceedings are "restricted." That is, all written communications between the public and the Commission are required to be served on the parties or all parties must be given prior notice of an oral presentation with an opportunity to be present at the presentation. Under "permit-but-disclose" procedures for adjudicatory actions the Commission can expect to receive more oral presentations from these parties in hotly-contested battles for government action.

Without a prohibition on last-minute lobbying, parties can have the "last word" in these cases without the knowledge of the opposing party other than through the filing of ex parte disclosure statements. Such disclosures of last minute presentations could often come to the attention of a party after the item has been decided on circulation -- since the Commission no longer would require service of the ex parte presentation by first class mail.⁹

The Commission's rules should not promote unseemly last-minute presentations in adjudicatory matters in which the opposing party has no opportunity to reply. Allowing such presentations up to the very day of a Commissioner's

⁹ Consultants takes no position on the proposal to apply "permit-but-disclose" rules to adjudicatory actions other than its potential for increasing last minute lobbying on circulation items.

vote -- particularly in adjudicatory-type proceeding -- rewards these attempts to have the "last word" and does little to instill public confidence in the fairness and impartiality of FCC decision-making.

III. The Commission Can Adopt a Version of its Sunshine Agenda Prohibition Period for Circulation Items that is Administratively Workable and Fair to all Parties and Interested Persons

Consultants urges the Commission to adopt a "period of repose" prior to final action on all matters decided by the full Commission. These matters reflect the most important and hotly-contested issues brought before the agency and deserve to be completely free of the taint associated with last-minute ex parte lobbying. This "period of repose" need not, however, mirror that imposed for open agenda actions.

Consultants suggests the following process for establishing a "period of repose" for circulation items. We believe this procedure is administratively convenient and has the added value of informing the public as to the status of circulation items.

The Commission would issue a periodic Public Notice of all items that have been put in circulation since the prior Public Notice and all items that remain on circulation from previous weeks. For new circulation items, the Commission could prohibit ex parte presentations from the date of the Public Notice or, in the alternative, the Commission could establish a prospective date of 7-10 days later that

would begin the prohibition period.¹⁰ (The Chairman's office could maintain an internal list of those items it has not yet voted and released into circulation that would be subject to a prohibition on presentations.) A circulation item would remain on successive lists until the Commission released a text of the decision, removed the item from the circulation process or returned the item to the staff for further consideration.¹¹ The Public Notice could either indicate the subsequent status of each circulation item or direct the public to check on its current ex parte status before resuming with "permit-but-disclose" lobbying.

IV. Conclusion

Comsultants urges the Commission to adopt a "period of repose" for circulation items prior to voting upon them. The Commission should end the artificial distinction between matters it decides in open Sunshine meetings and those decided on circulation. A "period of repose" is vitally important to maintaining the integrity of the decision-making process for all matters before the Commission. Circulation

¹⁰ A prospective date would reflect the extended timeframe for decision-making on circulation items. While the Sunshine Agenda Prohibition begins seven days prior to the actual decision (at the public meeting), circulation items typically take 30 days from the time the Chairman's office puts an item into circulation. Moreover, a prospective date would provide fair notice to parties that otherwise would not know that action on their matters was imminent. (With agenda meetings, interested parties know the meeting dates months in advance and can glean from the Commission and the press what items are on a particular agenda, allowing them to make final ex parte presentations before the Sunshine Notice is released.) Even with a 10 day prospective prohibition on circulation items, the typical period of repose would be 20 or more days.

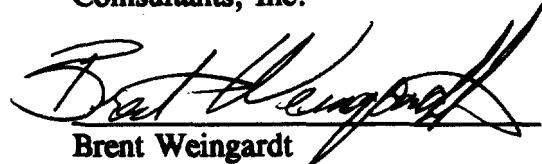
¹¹ We recognize that such a "Sunshine" Circulation List would require more staff effort to accurately maintain than the current Sunshine Agenda List due to the large number of circulation decisions. However, since documentation of the circulation process is maintained in a computer file that currently requires staff oversight, creating Public Notices based upon the computer file should not require an inordinate effort.

actions, which account for approximately 80 percent of all FCC decisions, should be insulated from the last second lobbying that undermines the public's confidence in government. A "period of repose" for circulation actions is even more crucial if the Commission adopts its proposal to place adjudicatory-type proceedings under permit-but-disclose ex parte procedures. The Commission could easily implement a Public Notice process for alerting the public of the "period of repose" for circulation actions, as it does now for Sunshine Agenda actions.

The Commission should be commended for its long commitment to ex parte procedures that exceed those required by law. Its adoption of a "period of repose" prior to its vote on circulation items would continue its leadership role in maintaining a decision-making process that is transparent and fair to the public and interested parties.

Respectfully submitted,

Comsultants, Inc.

A handwritten signature in dark ink, appearing to read "Brent Weingardt", is written over a horizontal line.

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